

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUDY GARZA,) Case No. CV 12-8553-RGK (JPR)
Petitioner,)
vs.) ORDER TO SHOW CAUSE
GREG LEWIS, Warden,)
Respondent.)

On October 4, 2012, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody. Petitioner indicates that he pleaded guilty to second-degree murder in June 1981 and was sentenced a month later. (Pet. at 2.) He had some kind of subsequent sentencing proceeding in September 1981. (Id. at 7.) Petitioner apparently did not challenge his conviction or sentence on direct appeal. (Id. at 2.) Beginning on September 3, 2011, Petitioner filed a habeas petition in each level of state court, claiming that his plea agreement was breached by his 15-years-to-life sentence because he had been promised he would be sentenced as a youth offender and stay incarcerated only until his 25th birthday. (Id. at 3-5.) Moreover, he claimed, his

1 counsel was ineffective for failing to move to withdraw
2 Petitioner's plea based on the breached plea agreement. (Id.)
3 Both the Los Angeles County Superior Court and the California
4 Supreme Court denied Petitioner's state habeas petitions as
5 untimely (Pet. Ex. A), whereas the California Court of Appeal
6 appears to have also reached the merits and found that no
7 "fundamental miscarriage of justice" occurred (id.).

8 Under the Antiterrorism and Effective Death Penalty Act of
9 1996 ("AEDPA"), Petitioner had one year from the date his
10 conviction became final in which to file a federal habeas
11 petition. See 28 U.S.C. § 2244(d). That statute provides:

12 (1) A 1-year period of limitation shall apply to an
13 application for a writ of habeas corpus by a person in
14 custody pursuant to the judgment of a State court. The
15 limitation period shall run from the latest of--

16 (A) the date on which the judgment became
17 final by the conclusion of direct review or the
18 expiration of the time for seeking such review;

19 (B) the date on which the impediment to
20 filing an application created by State action in
21 violation of the Constitution or laws of the United
22 States is removed, if the applicant was prevented
23 from filing by such State action;

24 (C) the date on which the constitutional
25 right asserted was initially recognized by the
26 Supreme Court, if the right has been newly
27 recognized by the Supreme Court and made
28 retroactively applicable to cases on collateral

1 review; or

2 (D) the date on which the factual predicate
3 of the claim or claims presented could have been
4 discovered through the exercise of due diligence.

5 (2) The time during which a properly filed
6 application for State post-conviction or other collateral
7 review with respect to the pertinent judgment or claim is
8 pending shall not be counted toward any period of
9 limitation under this subsection.

10 Although Petitioner's one-year limitation period would
11 normally have begun to run after his conviction became final and
12 would have presumably expired sometime in 1982, AEDPA extended
13 the limitation period for those whose convictions became final
14 before its enactment, on April 24, 1996, to one year after that
15 date, or April 24, 1997. United States v. Gamboa, 608 F.3d 492,
16 493 n.1 (9th Cir.), cert. denied, 131 S. Ct. 809 (2010).

17 Petitioner did not file his federal Petition until October 4,
18 2012, 31 years after his conviction became final.

19 From the face of the Petition, it does not appear that
20 Petitioner has any basis for contending that he is entitled to a
21 later trigger date under § 2244(d)(1)(B). Petitioner is not
22 contending that he was impeded from filing his federal Petition
23 by unconstitutional state action. Nor does it appear that
24 Petitioner has any basis for contending that he is entitled to a
25 later trigger date under § 2244(d)(1)(C). Petitioner is not
26 contending that any of his claims are based on a federal
27 constitutional right that was initially recognized by the U.S.
28 Supreme Court subsequent to the date his conviction became final

1 and that has been made retroactively applicable to cases on
2 collateral review. Finally, Petitioner has no basis for
3 contending that he is entitled to a later trigger date under
4 § 2244(d)(1)(D). Indeed, Petitioner acknowledges that he knew
5 the factual basis for his claims at the time of his sentencing.
6 (Pet., Garza Decl. ¶ 4.) Even if the Court accepts Petitioner's
7 claim that based on his counsel's assurances he believed that he
8 would be released from prison on his 25th birthday (id.), his
9 claim still comes 26 years after he learned the factual basis for
10 it (see id. ¶ 3 (noting that he was 20 years old at sentencing)),
11 which would have occurred at the latest when he was not released
12 from prison when he turned 25.

13 Thus, the Petition is time barred unless Petitioner can show
14 entitlement to statutory or equitable tolling. See Patterson v.
15 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). He has failed to
16 do so. No basis for statutory tolling under § 2244(d)(2) exists
17 here, as Petitioner apparently did not file a state habeas
18 petition until September 3, 2011, 14 years after the AEDPA
19 deadline had expired. See Ferguson v. Palmateer, 321 F.3d 820,
20 823 (9th Cir. 2003) (holding that § 2244(d) "does not permit the
21 reinitiation of the limitations period that has ended before the
22 state petition was filed," even if state petition was timely
23 under state law). In any event, the California Supreme Court
24 dismissed Petitioner's habeas petition as untimely by citing In
25 re Robbins, 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d 153, 159
26 (1998), and therefore he is not entitled to statutory tolling for
27 that reason as well. See Thorson v. Palmer, 479 F.3d 643, 644-45
28 (9th Cir. 2007) (holding that citation to Robbins indicates

1 untimeliness and noting that statutory tolling not available for
 2 petitions rejected by state court as untimely).

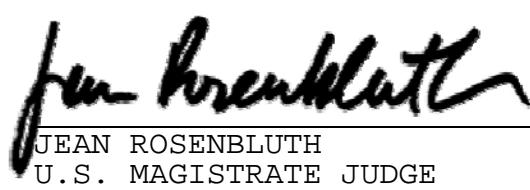
3 Under certain circumstances, a habeas petitioner may be
 4 entitled to equitable tolling. See Holland v. Florida, 560 U.S.
 5 ___, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010). A habeas
 6 petitioner is entitled to equitable tolling only if he shows that
 7 (1) he has been pursuing his rights diligently and (2) "some
 8 extraordinary circumstance stood in his way." See Pace v.
 9 DiGuaglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed.
 10 2d 669 (2005). Petitioner has attached to the Petition the
 11 declaration of his jailhouse lawyer, who states that Petitioner
 12 "does not comprehend the law, so there's no way he could have
 13 brought this sooner." (Pet., Treglia Decl.) But ignorance of
 14 the law does not justify equitable tolling. Rasberry v. Garcia,
 15 448 F.3d 1150, 1154 (9th Cir. 2006) (pro se petitioner's lack of
 16 legal sophistication insufficient for equitable tolling). And it
 17 is hard to imagine a circumstance that could entitle him to such
 18 tolling for 15 years. See Doe v. Busby, 661 F.3d 1001, 1015 (9th
 19 Cir. 2011) (noting that equitable tolling of 20 years "would be
 20 difficult to justify").

21 A district court has the authority to raise the statute-of-
 22 limitations issue sua sponte when untimeliness is obvious on the
 23 face of a petition; it may summarily dismiss the petition on that
 24 ground pursuant to Rule 4 of the Rules Governing § 2254 Cases in
 25 the U.S. District Courts, as long as the court gives the
 26 petitioner adequate notice and an opportunity to respond. Herbst
 27 v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

28 IT THEREFORE IS ORDERED that within 28 days of this Order,

1 Petitioner show cause in writing, if he has any, why the Court
2 should not dismiss this action with prejudice because it is
3 untimely. If Petitioner intends to rely on the equitable tolling
4 doctrine, he will need to include with his response to the Order
5 to Show Cause a declaration under penalty of perjury stating
6 facts showing that he has been pursuing his rights diligently and
7 "some extraordinary circumstance stood in his way."

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10 DATED: October 11, 2012


JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

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